IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ILLINOIS GRAIN COMPANY, et al,
Appellees.

Appeal From The United States District Court For The Northern District Of Illinois

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MOTION TO AFFIRM

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McCORMICK & HENDERSON INC., CHICAGO, ILL.

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Come now appellees, McNabb Grain Company, Federal North Iowa Grain Company, Union Hill Farmers' Elevator, Neilsen Grain Company, Ferris Grain Company, Frank Gibbons Grain Company, Cahill Grain Company, Diemer Grain Company, Priscilla Farmers' Cooperative Grain Company, Missal Farmers' Grain Company, Payne-Stotler Grain Company, Lostant Grain Company, and Isaac Barrett Grain Company, who were parties to the proceedings before the Interstate Commerce Commission and interveners as defendants in the Court proceeding below and, pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, move to affirm the decree of the District Court.

STATEMENT

These appellees are, and for many years have been, operators of small country elevators located at stations along a branch line of the New York Central Railroad west of Kankakee in the Illinois corn belt. Until the emergence of water transportation on the Illinois River over twenty years ago, the corn grown along this branch was hauled to appellees' elevators for shipment and appellees were able to carry on elevator operations and services such as are customarily rendered by country elevators. Due, however, to prohibitively high railroad rates and the substantially lower charges available for river transportation, the corn grown along the New York Central was gradually diverted to river elevators owned by large Chicago grain interests until virtually all rail movements of commercial corn in the area had ceased, and appellees were compelled to discontinue their elevator businesses.

This complete shut-down of appellees' normal business activities continued for several years until December 15, 1956, when the railroads established reasonable competitive all-rail rates to the East from the origin stations involved. Although the barge-rail rates were lower, appellees were able to recover a portion of the corn lost to their river competitors, especially in those instances where long truck hauls to the river were required. Appellees' elevators were then reopened and their services resumed until a temporary restraining order of a District Court, on August 27, 1957, suspended the all-rail rates for a period of three months and again forced appellees to close their elevators until the Court's restraining order was vacated.

Ordinarily these rail rates do not permit of drawing grain more than five or six miles to appellees' elevators whereas river elevators, with the advantage of lower barge-rail rates, are able to draw grain from fields as far as 40 miles or more distant. In the period following publication of the competitive rail rates the movement of corn on the river from the ten competing river elevators increased quite substantially. The record likewise makes it clear that any worsening of appellees' competitive position, in respect of transportation rates, would destroy their businesses and their investments in elevators and equipment and deprive them of their normal livelihood.

The railroad branch line previously mentioned, which is sometimes referred to as the Kankakee Belt, extends from Zearing, Ill., on the west to South Bend, Ind., on the east. It was originally incorporated and operated as the Indiana, Illinois & Iowa Railroad Company. For convenience, a map of this branch is attached hereto as Appendix A. It also shows other branches of the NYC from Kankakee to Chicago; the Illinois Central's line between the same points; portions of lines of the NYC leading south and southeast from Kankakee; and of its two main lines from Chicago to the East. The Kankakee branch is the direct line from the corn shipping points to the East, and it connects directly with every eastbound railroad from Chicago (including the NYC's main lines) at junctions east of Kankakee, including South Bend. The map also shows the ten river ports (Lacon to Lockport, Ill.) with which appellees compete for corn grown along the NYC, and also indicates highway distances from rail stations to river ports, ranging from 4 to 36 miles. The Kankakee branch

is a line of low traffic density, serving a rural area. There are no cities or large towns west of Kankakee—Streator being the largest—and few industries. Because of the inroads made on its tonnage in recent years by barge and motor truck, and the paucity of traffic, serious consideration has recently been given to abandoning the west end of this branch. (Rec. 192-193)

During the period when exorbitant all-rail rates and low barge-rail charges forced the cessation of appellees' elevator activities, corn from the origin area for milling in transit at Kankakee had to reach that nearly point by the following route: (a) trucking to the river, (b) barge to Chicago, (c) rail from Chicago to Kankakee, a distance of 75 miles via NYC, or 56 miles via Illinois Central. The Commission found that the aggregate distances via such tortuous route exceeded by 133 to 797 per cent the distance from Belt points to Kankakee and to certain eastern destinations. The rail distances alone from Chicago via Kankakee exceeded by 3.73 to 20.61 per cent the distances from the country origins via Kankakee. (Report, pp. 448-449) While Kankakee today receives most of this nearby corn by rail, the rate advantage of the barge-rail route has enabled it to continue handling a portion of the corn for Kankakee, despite the circuity of such route.

ARGUMENT

The Aggregate Charges Involved

Appellant refers to a 5-cent proportional from Kankakee branch origins to Kankakee, which is added to the reshipping rate from that point to arrive at the through charges in question. Appellant uses 54.5 cents, the through rate to New York, as a typical example. It also cites a 23-cent rate as a local rate applying from Streator, Ill., to Kankakee or Chicago. As the Commission's report indicates, the rates cited have been increased as a result of several general rate advances authorized by the Commission, but in order to avoid misunderstanding or confusion, appelless will refer to the rates used by appellant.

Appellant's discussion on p. 5 of its Jurisdictional Statement, with respect to the make-up of rates before and after December 15, 1956, has no bearing on the issue presented here. The first two charts on p. 6, relating to earlier rates, are correct so far as they go, and despite the absence of any movement under them, they applied via Chicago, Kankakee and all other points, just as do the present competitive rates.

In the chart at the bottom of p. 6, however, appellant seeks to make it appear that the rate applicable to shipments via Chicago is 72.5 cents while a movement via the direct route to the East through Kankakee is only 54.5 cents. The fact is that the rate of 54.5 cents applies via Chicago the same as via all other points, and with all the privileges and benefits available to any shipper. Although appellant seeks to have it appear that a movement via Chicago involves payment of higher charges than are paid via other points, the Commission's report correctly shows

the contrary, and the fact is conceded on p. 9 of appellant's statement. Although appellant implies on p. 7, and elsewhere in its Statement, that it is no longer on a competitive equality, there is nothing anywhere in its Jurisdictional Statement, or in the record, that gives the slightest support to its contention.

Appellant's Opposition to All-Rail Transportation

Appellant's position in this case is plainly shown in the testimony of its principal witness, who stated:

> "We have tremendous investments in Chicago, built upon the river and its low cost transportation, which gives Chicago an opportunity to utilize its natural adtages of being on the Great Lakes, on its inland waterways, as well as being able to be served by truck and rail." (Rec. 790)

and also:

> "* * * we have a real interest in grain that comes in by barge. * * *" (Rec. 795)

While investments of these appellees cannot be said to be tremendous, they mean as much to them as do investments of Chicago grain firms on the river to appellant. Unlike appellant, appellees do not seek a monopoly over the corn that is produced in the vicinity of their elevators, but only the right to compete for a share of it. This is all that the reduced rail rates have accomplished.

Rail competitive rates have forced river shippers to make higher bids to the farmer for his corn due to competition from rail buyers. Previously, when only prohibitively high rail rates were in effect, river shippers had complete control over prices to be paid the grower. They were free to base their bids on a spurious (because unused) rail rate of 23 cents to Chicago although the river transportation charge they actually paid was only about 4½ cents. With

competitive and bona fide rail rates the producer is assured a fair price for his corn, and appellant's rate advantage is limited perforce to the actual difference between the lower charge by river and rail and the competitive all-rail rates, instead of on a purely *paper* rail rate to Chicago. While appearing in these proceedings as purported rail shippers and claiming—without any basis for it—that rail shipments moving via Chicago from the Kankakee branch are discriminated against, the record shows that only 31 out of approximately 1800 cars moved to, or via, Chicago. None of the 31 cars was identified as having been shipped for account of Chicago interests, and the direction of movement of such cars from Chicago was not indicated, but if shipped to the East they were charged exactly the same rates as any similar shipments moving via the direct routes eastward from Kankakee.

While ostensibly demanding equality of treatment as a rail shipper—something it has always had and still has—appellant is in the anomalous position of urgently insisting that these rail rates be materially increased, while at the same time demanding that the same rates be made to apply over additional routes (more circuitous even, than those presently applying via Chicago) with greater transit privileges and a broader commodity application than are now provided, all of which, of course, would substantially increase the railroads' costs.

While Discrimination under Section 3(1) Is Not an Issue in a Fourth Section Proceeding, No Such Discrimination Exists

Although it is charged, and frequently reiterated in appellant's Jurisdictional Statement, that the rates in question subject Chicago to discrimination and also that the Commission did not consider evidence it submitted to show that the rates would unduly prejudice Chicago grain inter-

ects in violation of Section 3 (1) of the Interstate Commerce Act, the record is completely devoid of proof of discrimination or prejudice. Aside from purely gratuitous statements, appellant has made no attempt to support its charges as will be demonstrated in the succeeding pages of this argument. On the other hand, the Commission's report herein definitely and correctly shows (p. 451) that

> "* * * since the proposed rates are effective over Chicago, that point has the same stature as all other corn-processing points in official classification territory in their application. * * *"

When appellant's specific claims are analyzed, it will be found that in no instance do they show, or have any bearing upon the question of, discrimination or prejudice. They deal with matters beyond the purview of the governing tariffs, and are nothing more than demands by appellant for new and additional provisions and services over and above what the railroads have published in their tariffs. The fallacy of its contentions is readily apparent in the following language on p. 7 of its Statement:

> "* * * The effect of this milling in transit requirement is to make the new low Kankakee combination *rate applicable exclusively on corn products.* At the same time, the railroads made the one-factor rates inapplicable via Kankakee, leaving only the new, drastically reduced, Kankakee combination to apply. To New York from Streator, this resulted in a Kankakee combination of 54.5 cents on corn products, as shown by Chart III. The rate on corn remained unchanged at 72 cents, since the 5 cent inbound rate could not be used on shipments of whole corn. * * * the NYC * * * refused to make the 5 cent rate applicable to Chicago * * * where it could have been combined with the Chicago proportionals, making the Chicago combinations equal to the new Kankakee combination. * * *"

(a) In No Instance Do the Rail Rates in Issue Apply on Whole Corn.

In the language just quoted appellant objects to having the railroads' tariffs confined to corn products, but such limitation applies to all shippers alike, regardless of origin, destination or routing. The application of the through 54.5 cent rate referred to is the same, whether the traffic moves via Chicago or over direct routes eastward from Kankakee. For the same reason—and contrary to the inference appellant seeks to have drawn here—the rate of 72 cents on corn has remained unchanged and applied to all shipments from origins west of Kankakee to the East, regardless of ownership or the route traveled.

Obviously then, there can be no discrimination in either case, and the Commission correctly holds in effect that a fourth section proceeding is not a proper vehicle for proposing to bring additional commodities and services within the application of the tariffs here involved. The Interstate Commerce Act provides full opportunity for parties to present for the Commission's legislative determination any such question of new and additional rates.

(b) The 5-Cent Proportional Rate to Kankakee.

The last part of the language quoted above would make it appear that Chicago does not have the benefit of the 5-cent proportional to Kankakee when corn is shipped to Chicago for transit or reshipment to the East. We have previously adverted to appellant's admission to the contrary.

The 5-cent rate was not published to Chicago (a point 75 miles beyond Kankakee via the NYC) or to any other point for that matter, but it definitely applies via Chicago on shipments to the East as a part of the 54.5 cent

combination through rate. Its application on shipments processed at, or shipped through, Chicago is exactly the same as at Kankakee, or at Danville or Paris, Ill., processing points located south of Kankakee as Chicago is north. As the rate charged on corn moving to, or through, Chicago is in every instance the same as is charged on like traffic moving through all other points, appellant errs in implying that the movement via Chicago involves higher charges than via some other point. The Act prohibits the charging "any greater compensation *in the aggregate.*" (Sec. 4 (1) of the Interstate Commerce Act.) The law does not concern itself with the manner in which segments of a rate are put together so long as there is equality of treatment between shippers in the *aggregate* amount of charges they actually pay for a given service.

(c) The Alleged Restrictive Transit Privileges and Routing.

At p. 9 of appellant's Statement, it is claimed that the reduced combination rates

> "were subject to more restrictive transit privileges and *more restrictive routing than Chicago* processors had *previously had available.*"

It is noteworthy that appellant makes no claim or suggestion here that any other processor has any less restrictive transit privileges or routing in connection with these rates, but only that they are more restrictive than Chicago *previously had available.* The rates, in these respects as in all others, apply indiscriminately.

Moreover, the transit privileges and routing Chicago processors had under higher rates are still available, just as they are available to the Kankakee or Danville processor. Here again the question of enlarging the quantum

of the services rendered by the railroads for less compensation is one for the Commission's rate-making power and beyond the scope of a fourth section proceeding where the rates in issue are definitely stated and the measure of the service to be performed clearly specified in the tariffs.

(d) No Shipper at Any Point Receives a Credit or Rebate of Any Part of the Inbound Rate To Milling Points.

On p. 8 of appellant's Jurisdictional Statement it is erroneously stated:

> "• • • on and after December 15, 1956, the processors at Kankakee and east thereof could take advantage of the new rates, knowing that when the corn was processed and shipped out as corn products, they would secure a credit for the difference between the 23-cent rate and the 5 cent rate. They were thus in a position to offer 18 cents per 100 pounds (approximately 10 cents per bushel) more for the corn than could the Chicago grain dealers and elevator operators. • • •"

The fact is that a 23-cent rail rate is collected at Kankakee upon arrival of the corn the same as it is at Chicago. Processors at both points have identical milling-in-transit privileges. There is no provision in the tariff for a rebate or "credit" of any part of the 23-cent inbound rate, as appellant implies, and to rebate any portion thereof would subject shipper and carrier alike to the heavy penalties imposed by law for such a violation. [49 U.S.C., Sec. 41(1)]

Actually, the carrier would have no notice, at either Chicago or Kankakee, of the disposition to be made of the corn until reshipment takes place. The corn might be consumed locally, in which event the carrier in either instance would retain the entire 23 cents; or the corn, or the product

thereof, could be shipped to the Pacific Coast, the South, or the North, as well as to the East. We cannot too strongly stress the fact that no adjustment whatever of the through charges is possible at either Kankakee or Chicago until the carrier receives reshipping orders apprising it of the destination of the shipment. In the event the movement is to a point in Eastern territory, the carrier in either case will assess the difference between the 23 cents collected on the inbound shipments and the through rate of 54.5 cents. Whether the outbound movement is from Chicago or Kankakee, the balance of the charges to be collected will be precisely the same, namely, 31.5 cents.

During all the time a shipment remains at Chicago or Kankakee, the 5-cent proportional has no standing or application. It is never collected as a separate charge. It is never credited to the shipper, as appellant indicates, or any refund made from the 23-cent inbound rate. It enters into the computation of the freight charges only after a shipment has been consigned to, or delivered at, destination in the East. In no instance is the 5-cent proportional any less of a segment of the aggregate through charges via Chicago than it is via Kankakee. Since the rate via Chicago is the same as via Kankakee, it is obvious that Chicago is in the same position to offer 18 cents more for corn, based on the 5-cent proportional, because it enters into the make-up of the through charges in the same manner. If there is any disadvantage here, it lies in requiring Kankakee processors to put up the same amount of money for an average inbound haul of 38 miles as Chicago does for an additional transportation movement of 75 miles, including costly transportation services performed in and through the congested Chicago district.

(c) Cases Cited by Appellant Do Not Support Its Contentions.

Contrary to the contention of appellant (on p. 12) the Commission's treatment and consideration of the evidence in this case fully conforms to the dicta quoted by appellant from the *Intermountain Rate Cases*, 234 U.S. 476. Indeed, appellant has given reference to no decision supporting its contention that a fourth section investigation, involving a carriers' application only must be decided—not on the basis of the provisions of the application—but only in connection with such new rates, rules, and routes as may be proposed by adverse parties. Appellant belabors its claim of discrimination, but there is not the slightest support in the record or in its Jurisdictional Statement for any of its contentions. Such statements as

> "it is beyond the power of the Commission to authorize fourth section departure rates which would violate other sections of the Act"

and that

> "The Commission did not explain why it departed, in the instant case, from its own precedents on the question of its power to grant fourth section relief."

are simply a play on words without reason or basis. No violation has been shown, and no such departure by the Commission as appellant ascribes to it.

Unfair and Destructive Competitive Practices

Appellant's reference (p. 12) to unfair and destructive competitive practices seems ironic in view of the almost complete destruction of the business operations of these appellees and the transportation of corn by rail. Until the establishment of reasonable rail rates enabled them to recover a portion of the corn they had lost to the river,

the river shipping interests had taken over all of the corn grown along the Kankakee branch while rail elevators were idle and falling into disrepair.

Far from having an adverse effect on river transportation, the reduced rail rates seemed to have actually stimulated the movement of corn by water from the ten competitive river ports, for the Commission found (Report, p. 452) that those river ports

> "increased their shipments of corn to Chicago from 402,105 tons in the period December 15, 1955 to August 30, 1956, to 493,669 tons in the corresponding period the following year during which time the proposed rates were in effect.

Prior to publication of the reduced rail rates, shipments by rail were limited to several hundred cars per year of Government corn for export that moved at rates substantially lower than those here involved. (Report, 440, 448) While the competitive rail rates are higher than those available for barge-rail transportation, they have been the means of returning to these appellees and the railroads at least a share of the corn previously lost to the river, principally from fields at some distance from river elevators. For example, in the first six months following establishment of these rail rates there were 388 cars shipped from Union Hill, a point 31 miles from the nearest river port and only 14.5 miles from Kankakee. On the other hand, the rail rates failed to attract a single car for shipment from Moronts, a rail point on the river and only four miles from a river port. The record contains many examples of corn being hauled to the river from, and through, points where appellees' elevators are located, despite the competitive rail rates in effect and additional truck hauls of 20 miles, or more, required to reach the river elevators.

The Commission Did Not Fail to Consider All of the Evidence Adduced by Appellant, but There Was Not a Scintilla of Evidence Tending to Prove Discrimination.

Appellant makes the broad charge that the Commission did not consider evidence of discrimination. We have previously demonstrated there was no such evidence. If there had been, it should be a simple matter for appellant to point out specifically wherein, and how, such discrimination occurs. We have shown that the rates and tariff provisions apply impartially to all shippers, and the matters that appellant complains about are new and additional proposals intended for its own special benefit. The Commission properly held they have no place in a fourth section proceeding where its consideration must necessarily be limited to the application before it.

Typical of appellant's unsubstantiated general assertions of discrimination are the following:

> "* * * The Board of Trade * * * submitted evidence showing discrimination against Chicago. It filed a brief and was heard on oral argument. But the Commission refused to consider that evidence. * * *" (p 16)

and, on p. 17:

> "* * * the Commission has authorized particular rates which result in undue prejudice to some shippers and undue preference of others."

It is fair to ask: What evidence? What prejudice? Appellant's Statement is replete with similar bald assertions of the kind just quoted, but nothing that is said anywhere in its Statement even remotely tends to sustain them and they are wholly without support in the record. There is not a single provision, restriction, qualification or limitation in the tariffs that does not apply equally to all points and all shippers.

In view of what as already been stated, it seems unnecessary to comment on similar general averments on pp. 17-18 and the statement (p. 19) that

> "* * * An elevator having the benefit of these special preferential rates, can take all the business from a competing elevator, just a few miles away. * * *"

River elevators for many years have indeed taken all the business from these appellees because of their preferential rates, but the statement quoted has no application whatever to the reduced rail rates. Elevators which are not located on the Kankakee branch have for years been sending their corn to the river, and they have continued to do so since the competitive rail rates took effect, despite the longer truck hauls required. Appellant's contention also runs counter to the admonition of this Court that it will not listen to a party who complains of a grievance which is not his. *Interstate Commerce Commission* v. *Chicago, R. I. & P. R. Co.*, 218 U.S. 88, 109; *Clark* v. *Kansas*, 176 U.S. 114, 118.

Appellant Relies on Matters That Are Not of Record in These Proceedings.

At the bottom of p. 13, and continuing through to the end of p. 20, of appellant's Jurisdictional Statement, reference is made to certain matters *de hors* the record in this case. They include *inter alia* alleged recommendations of some "special grain committee" made on April 13, 1961 (more than ten months after issuance of the Commission's report herein.) These appellees have no knowledge whatever of such matters, or of recent proceedings before the Commission involving other rates, or the other things referred to by appellant that arose after the close of the record in this case. Appellant's representations

with respect to them have no bearing upon the issues here, and its attempt to inject them into this case is unwarranted and improper. *Schley* v. *Pullman Sleeping Car Co.*, 120 U.S. 575; *Louisiana & P. Ry. Co.* v. *United States*, 246 U.S. 457.

CONCLUSION.

These appellees have a vital interest in the outcome of this case, for their businesses and their livelihood are at stake.

We believe it has been plainly demonstrated that appellant has utterly failed to advance any sound reason for its attack on the legality of the Commission's order granting fourth section relief and the decision of the District Court upholding it. While claiming discrimination and prejudice against Chicago, and asserting that the Commission failed to consider evidence thereof, appellant has signally failed to substantiate any of its contentions. It has, without question, the identical rates, routes, milling-in-transit privileges and all other provisions available to any other shipper anywhere, a fact which appellant has failed to controvert or disprove. To the extent that it discusses its claims specifically, it will be found they involve matters and things in nowise contained in the tariffs here involved and hence not proper subjects for consideration or review in a fourth section case. These tariffs do not differentiate between shippers or localities in any particular. They have uniform application to all.

Appellant's interest here is in water transportation in which it has tremendous investments. The restoration of rail competition has broken up the monopolistic control which appellant had over both the transportation of, and the bidding for, corn grown along the NYC. Congress, in

the Hoch-Smith Resolution, has declared that products of agriculture should have "the lowest possible lawful rates compatible with the maintenance of adequate transportation service. (49 U.S.C., Sec. 55) *Increased Railway Rates, Fares and Charges,* 248 I.C.C. 545, 611.

Experience with the reduced rail rates has conclusively shown that while they have been the means of regaining for appellees and the railroad a portion of the corn previously lost to the river, they have had no adverse effect upon appellant or its tremendous river investments. The transportation of corn from this area by water actually increased following establishment of the competitive rail rates. Appellant's claim of destructive competition is wholly unfounded.

Appellant has presented no substantial issue warranting plenary consideration, and the judgment of the Court below should accordingly be affirmed.

Respectfully submitted,

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6202 South Campbell Avenue,
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Attorney for McNabb Grain Company and Others.

Dated March 5, 1963.

PROOF OF SERVICE

I, LEO P. DAY, Attorney for Defendants-Appellees McNabb Grain Company and others, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of March, 1963, I served copies of the foregoing Motion to Affirm of the Defendants-Appellees McNabb Grain Company and others on the several parties by mailing copies thereof in duly addressed envelopes with postage prepaid as follows:

1. On the Appellant, Board of Trade of the City of Chicago, copies to its attorneys Harold E. Spencer, Esq., and Richard M. Freeman, Esq., One North LaSalle Street, Chicago 2, Illinois.

2. On the Plaintiffs-Appellants, A. L. Mechling Barge Lines, Inc., Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company, and Mazon Farmers Elevator, copies to their attorneys Edward B. Hayes, Esq., and Wilbur S. Legg, Esq., 135 South LaSalle Street, Chicago 3, Illinois.

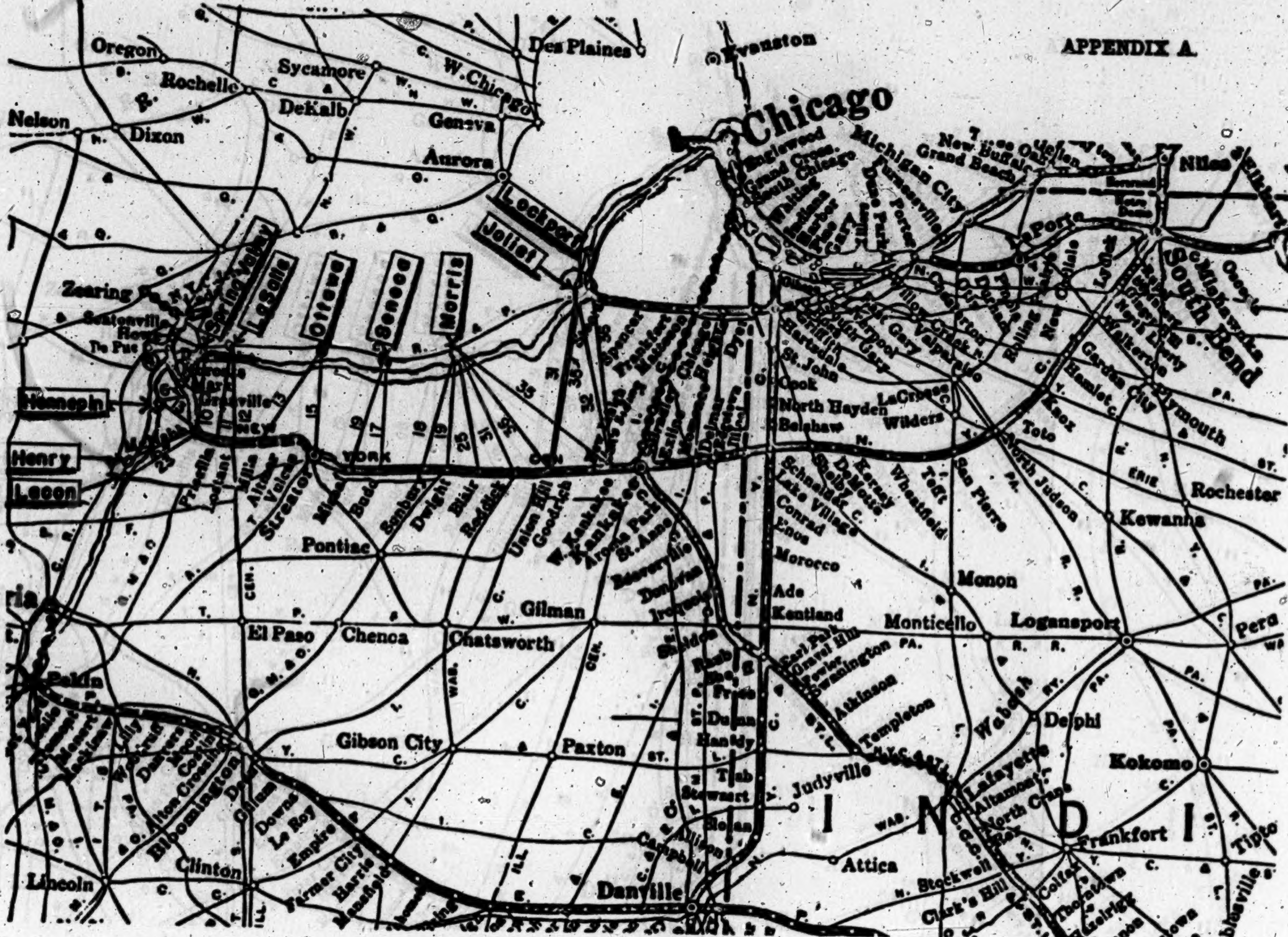
3. On the Appellee, United States of America, copies to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D.C., and to James P. O'Brien, Esq., United States Attorney for the Northern District of Illinois, Room 450 United States Court House, Chicago, Illinois.

4. On the Appellee, Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel, and H. Neil Garson, Esq., its Associate General Counsel, Washington 25, D.C.

5. On the Appellee, The New York Central Railroad Company, copies to its attorney Richard J. Murphy, Esq., Room 1225 LaSalle Street Station, Chicago 5, Illinois.

LEO P. DAY

APPENDIX A.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Des Plaines
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Lockport
Joliet
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Morris
Zearing
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Henry
Lacon
Pekin
Streator
Pontiac
El Paso
Chenoa
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